RECORD NO. 19-4758

In The
United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

BRIAN DAVID HILL,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

APPELLANT'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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I. STATEMENT OF PURPOSE

In the undersigned counsel's judgment, the following situations exist: (1) a material factual or legal matter was overlooked in the decision and (2) this proceeding involves one or more questions of exceptional importance.

Specifically, the material factual or legal matter which was overlooked and the question of exceptional importance is whether or not *United States v. Haymond*, 139 S. Ct. 2369 (2019), altered previous law to require trial by jury and proof beyond a reasonable doubt in revocation hearings. The panel ruled that *United States v. Ward*, 770 F.3d 1090 (4th Cir. 2014), was still good law and, consequently, it was bound by that earlier precedent. Therefore, Appellant seeks *en banc* review so that *Ward* can be reconsidered within the framework set forth by *Haymond*.

II. STATEMENT OF THE ISSUES

Whether the panel erred in failing to find that the district court erred in sentencing Appellant by denying Appellant his Sixth Amendment right to trial by jury and/or by finding Appellant guilty by a preponderance of the evidence rather than beyond a reasonable doubt or, in the alternative, whether existing law should be extended and/or modified to find the above.

Whether the panel erred in failing to find that the district court erred in finding that the evidence before it was sufficient to find that Appellant violated his supervised release by violating Virginia Code § 18.2-387.

Whether the panel erred in failing to find that the law should be extended and/or modified to hold that the district court abused its discretion in denying Appellant's motion to continue the revocation hearing until after the underlying criminal appeal was completed.

III. SUMMARY OF THE ARGUMENT

This Court should find that the panel erred in failing to find that the district court erred as a matter of law in conducting the revocation hearing without a jury and by making findings of guilt by preponderance of the evidence, rather than beyond a reasonable doubt, based upon those findings of fact. Alternatively, existing law, as recently modified by the Supreme Court of the United States should be extended and/or modified to find the above.

This Court should find that the panel erred in failing to find that the district court erred in finding that the evidence before it was sufficient to find that Appellant violated his supervised release by violating Virginia Code § 18.2-387 because the evidence fails to show that Appellant acted intentionally to make an obscene display or exposure of his person.

This Court should find that the panel should have extended and/or modified existing law to hold that the district court abused its discretion when it denied Appellant's motion to continue the revocation hearing until after the underlying criminal appeal was completed.

IV. ARGUMENT

i. This Court should find that the panel erred in failing to find that the district court erred as a matter of law in conducting the revocation hearing without a jury and by making findings of guilt by preponderance of the evidence, rather than beyond a reasonable doubt.

This Court should find that the panel erred in failing to find that the district court erred as a matter of law in conducting the revocation hearing without a jury and by making findings of guilt by preponderance of the evidence, rather than beyond a reasonable doubt, based upon those findings of fact. Until recently, it was undisputedly considered constitutionally permissible to revoke supervised release in a bench hearing, without a jury, and to determine guilt by preponderance of the evidence, rather than beyond reasonable doubt, based upon findings of fact by the district court. *See, e.g., United States v. Capley*, 978 F.2d 829, 81 (4th Cir 1992); *United States v. Faulks*, 195 Fed. Appx. 196, 198 (4th Cir. 2006) (unpublished).

However, on June 26, 2019, approximately two and one-half (2 ½) months prior to Appellant's revocation hearing, the Supreme Court of the United States decided *United States v. Haymond*, 139 S. Ct. 2369 (2019).

In *Haymond,* the defendant was initially convicted of possession of child pornography, which is the same initial offense as Appellant. *Id*. at 2373. As in the instant case, Haymond was sentenced to a term of (10) years of supervised release. *Id.* at 2574; (JA 7). Haymond was later caught, while on supervised release, with additional child pornography and a revocation hearing was conducted before a

district judge without a jury and under a preponderance of the evidence standard, not the beyond a reasonable doubt standard. *Id.* Similarly, in the instant case, Appellant appeared before a district judge in a revocation hearing based upon his alleged indecent exposure, without a jury and under a preponderance of the evidence standard. (JA 26-27, 35-36, 120-21).

Both Haymond and Appellant were sentenced to an additional term of incarceration based upon the findings of fact of a district judge, without a jury, by a preponderance of the evidence. *Id.*; (JA 120-21).

Although Haymond's violation invoked the mandatory minimum provision of 18 U.S.C. § 3583(k), whereas Appellant's sentence for his alleged violation fell under 18 U.S.C. § 3583(e), Appellant maintains that the expanded scope of trial by jury and the burden of proof being beyond a reasonable doubt also applies to Section 3583(e) violations, such as this case, either directly through *Haymond* implication through Haymond's reasoning, or through an expansion and/or change in existing law.

"Together with the right to vote, those who wrote our Constitution considered the right to trial by jury the heart and lungs, the mainspring and the center wheel of our liberties, without which the body must die; the watch must run down; the government must become arbitrary. Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the

right to a jury trial sought to preserve the people's authority over its judicial functions." *Haymond*, 139 S. Ct. at 2375. (internal citations omitted)[1].

Many statements and passages in the Court's opinion strongly suggest that the Sixth Amendment right to a jury trial applies to any supervised-release revocation proceeding. For example, the first sentence of the opinion reads: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Haymond*, 139 S. Ct. at 2373.

Unlike the previous statement of ages old law, in a supervised-release revocation proceeding, a judge, based on the preponderance of the evidence, may make a finding that takes a person's liberty, in the sense that the defendant is sent back to prison. The Supreme Court recognized that the Sixth Amendment applies to a "criminal prosecution," and then gave that term a broad definition that encompasses any supervised-release revocation proceeding.

The Court defined a "crime" as any "ac[t] to which the law affixes ... punishment," and says that a "prosecution" is "the process of exhibiting formal charges against an offender before a legal tribunal." *Haymond*, 139 S. Ct. at 2376. The Court, however, uses this definition for the purpose of declaring that every

[1] For the sake of brevity, Appellant will not reproduce the Supreme Court of the United States' eloquent remarks from *Haymond* on the historic and fundamental importance of both the right to trial by jury and that proof of criminal conduct must be beyond a reasonable doubt. Appellant hereby incorporates by reference, as if fully set forth herein, pages 2376 through 2378 of the *Haymond* opinion.

supervised-release revocation proceeding is a criminal prosecution. See *Haymond* 139 S. Ct., at 2379 ("[A] 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed.... [A]n accused's final sentence includes any supervised release sentence he may receive".)

Quoting *Blakely v. Washington*, 542 U.S. 296, 304, (2004), the Court states that "a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *Haymond*, 139 S. Ct. at 2370. Since a defendant sentenced to incarceration after being found to have violated supervised release is receiving a "punishment," then the Court's statement means that any factual finding upon which that judgment is based must be made by a jury, not by a judge.

While both *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. United States*, 570 U.S. 99 (2013), apply to a defendant's sentencing proceeding and not expressly to a supervised-release revocation proceeding, which has been described at times as a "postjudgment sentence-administration proceedin[g]," the Court states that "the demands of the Fifth and Sixth Amendments" cannot be "dodge[d] by the simple expedient of relabeling a criminal prosecution a ... 'sentence modification' imposed at a 'postjudgment sentence administration proceeding." *Haymond*, 139 S. Ct. at 2379. The meaning of the Court's above statement is clear.

A supervised-release revocation proceeding is a criminal prosecution and is therefore governed by both the Fifth and Sixth Amendments. See *Haymond*, 139 S. Ct. at 2390 ("any accusation triggering a new and additional punishment [must be] proven to the satisfaction of a jury beyond a reasonable doubt"); *Id.* at 2380 ("a jury must find all of the facts necessary to authorize a judicial punishment").

The Court, in summary, posits that parole was constitutional, but supervised release is entirely different. Haymond, 139 S. Ct. at 2381-82. The implication in the above statements is clear enough: All supervised-release revocation proceedings must be conducted in compliance with the Sixth Amendment. The Court hints at where it is heading when it writes: "[O]ur opinion, [does] not pass judgment one way or the other on §3583(e)'s consistency with *Apprendi*." *Haymond*, 139 S. Ct. at 2382-84, n.7. Section 3583(e), the section under which Appellant was sentenced, sets out the procedure to be followed in all supervised-release revocation proceedings. Therefore, the Court left open the door that provision, the one through which Appellant was sentenced, is not consistent with *Apprendi*, which means that Appellant's proceeding required trial by jury.

There is no clear ground for limiting the *Haymond* opinion only to Section 3583(k). The Court simply let that issue sleep for another day. Today is that day. This Court should recognize the larger paradigm shift which has occurred in the Supreme Court's reasoning, which when applied, protects Appellant from being

sentenced to further incarceration without a jury and requires a beyond a reasonable doubt evidence standard.

The panel relies on *United States v. Ward*, 770 F. 3d 1090 (4th Cir. 2014), and concludes, without further analysis, that *Haymond* had no impact on *Ward* and, therefore, the Court states that Ward remains good law foreclosing Appellant's argument. Appellant's specifically submits that the panel erred in summarily concluding that *Haymond* does not modify *Ward*. To the extent necessary, Appellant moves this Court to convene *en banc* to overrule *Ward* based upon *Haymond*.

ii. This Court should find that the panel erred in failing to find that the district court erred in finding that the evidence before it was sufficient to find that Appellant violated his supervised release by violating Virginia Code § 18.2-387 because the evidence fails to show that Appellant acted intentionally to make an obscene display or exposure of his person.

The district court erred in finding that the evidence before it was sufficient to find that Appellant violated his supervised release by violating Virginia Code § 18.2-387 because the evidence fails to show that Appellant acted intentionally to make an obscene display or exposure of his person. That statute provides, in relevant part, that "[e]very person who **intentionally** makes an **obscene** display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a Class 1 misdemeanor." Va. Code § 18.2-387 (emphases added).

"The `obscenity' element of Code § 18.2–387 may be satisfied when: (1) the accused admits to possessing such intent, *Moses v. Commonwealth*, 611 S.E.2d 607, 608 (Va. App. 2005)(*en banc*); (2) the defendant is visibly aroused, *Morales v. Commonwealth*, 525 S.E.2d 23, 24 (Va. App. 2000); (3) the defendant engages in masturbatory behavior, *Copeland v. Commonwealth*, 525 S.E.2d 9, 10 (Va. App. 2000); or (4) in other circumstances when the totality of the circumstances supports an inference that the accused had as his dominant purpose a prurient interest in sex, *Hart*, 441 S.E.2d at 707–08. The mere exposure of a naked body is not obscene. *See Price v. Commonwealth*, 201 S.E.2d 798, 800 (Va. 1974) (finding that "[a] portrayal of nudity is not, as a matter of law, a sufficient basis for finding that [it] is obscene"); *Romick v. Commonwealth*, No. 1580-12-4, 2013 WL 6094240, at *2 (Va. Ct. App. Nov. 19, 2013)(unpublished)(internal citations reformatted).

While the evidence may show that Appellant was naked in public, as stated above, nudity, without more, is not obscene under Virginia law. Rather, "[t]he word `obscene' where it appears in this article shall mean that which, **considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex**, that is a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious

literary, artistic, political or scientific value." Va. Code § 18.2-372 (emphasis added). While Virginia does not appear to have established a clean definition of criminal intent, Black's Law Dictionary defines it as "[a]n intent to commit an actus reus without any justification, excuse, or other defense."

In summary, in order to show that Appellant violated his supervised release by committing the offense of indecent exposure under Virginia law, the government was required to prove, among other things, that Appellant had the intent to display or expose himself in a way which has, as its dominant theme or purpose, appeal to the prurient interest in sex, as further defined above, without any justification, excuse, or other defense.[2] The government failed to do so. Rather, the government's evidence in the light most favorable to the government and presented through its own witnesses, showed Appellant as someone who was running around naked between midnight and 2:00 a.m. and taking pictures of himself because he believed that someone was going to hurt his family if he did not do so. (JA 42-43, 53).

The district court did not hear, however, any evidence of Appellant having his dominant theme, or purpose being an appeal to the prurient interest in sex. For example, there was no evidence of Appellant making any sexual remarks, being

[2] For the reasons stated above, the government's burden was to prove every element of the offense, including the *mens rea*, beyond a reasonable doubt. However, even if, *arguendo*, this Court were to find that the government's burden was only a preponderance of the evidence, the government has still failed to carry its burden.

aroused, masturbating, or enjoying his conduct, sexually or otherwise. If a person was purposing to expose himself in public because he or she found it sexually arousing, it would be logical that he or she would pick a place and time where he or she would expect to encounter lots of members of the public. Appellant did not do that. Rather, he was running around between midnight and 2:00 a.m. and the witnesses to his nudity were few. Hence, the statements Appellant made to police and his conduct both indicate that, in the light most favorable to the government, he was naked in public while having a psychiatric episode, but without the intent necessary to commit indecent exposure under Virginia law. Respectfully the panel erred when it found that the government carried its burden on this element. As with all elements of an offense, there must be sufficient evidence to allow a reasonable finder of fact that the element was met and that did not occur here. Consequently, the district court erred, as a matter of law, when it found that Appellant had violated his supervised release by committing the Virginia state law offense of indecent exposure as per Virginia Code § 18.2-387.

iii. This Court should find that the panel should have extended and/or modified existing law to hold that the district court abused its discretion when it denied Appellant's motion to continue the revocation hearing until after the underlying criminal appeal was completed.

This Court should find that the panel should have extended and/or modified existing law to hold that the district court abused its discretion when it denied Appellant's motion to continue the revocation hearing until after the underlying

criminal appeal, which was a trial *de novo*, was completed. As stated above, this Court should extend and/or modify existing law to find that Appellant had a constitutional right to a trial by jury and for his guilt to be determined to the beyond a reasonable doubt standard.

An abuse of discretion occurs when the district court demonstrates "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

However, if the district court had not wanted to empanel a jury, it could have still protected Appellant's constitutional rights by simply granting Appellant's motion to continue the hearing in order to allow Appellant's pending state court appeal, which was a trial *de novo*, to reach a final decision. (JA 30-36). Had the district court done so, it could have used the final conviction from the Virginia state court, if the retrial were unsuccessful, as a factual basis for a revocation because Appellant would have, at that point, been determined to be guilty of said underlying offense beyond a reasonable doubt by a jury of his peers and any further appeal at that point would have not been a complete retrial but appellate review on an old record. Conversely, if said appeal were successful, then the district court could have dismissed the revocation petition. Therefore, the district court demonstrated an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay by insisting that the hearing proceed that day.

As provided in 18 U.S.C. 3583 (e)(4), and discussed at the revocation hearing, the district court could have ordered Appellant to remain at his place of residence during non-working hours and/or placed him on electronic monitoring. (JA 103-06). Such an order would have alleviated any public safety concern while Appellant's appeal was ongoing in state court. Therefore, the district court abused its discretion when it denied Appellant's motion to continue, as the district court could have alleviated the basis for this appeal by merely granting the continuance. Respectfully, the panel erred when it affirmed the district court.

V. CONCLUSION

For the reasons stated above, the Appellant urges this Court to grant his petition for rehearing/rehearing *en banc*, vacate and/or modify the panel's opinion and judgment entered October 16, 2020 and vacate his conviction entered on October 4, 2019.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This Petition complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

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Dated: October 27, 2020

/s/ E. Ryan Kennedy
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 27th day of October, 2020, I caused this Petition for Rehearing and Rehearing *En Banc* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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